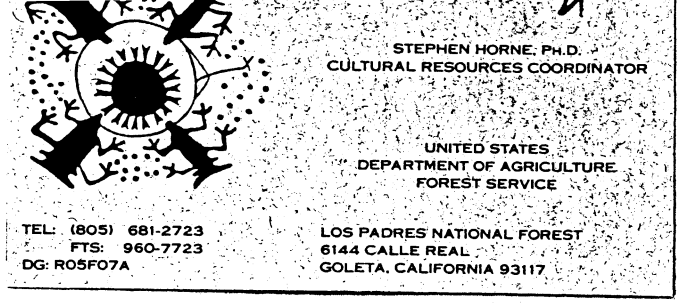

ISSUE PAPER

IMPACTS OF LIVESTOCK GRAZING ON CULTURAL RESOURCES

Submitted by

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and

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February 2, 1993
(Groundhog Day)

A state of some confusion has developed concerning the problem of Section 106 compliance in grazing-related undertakings on National Forest System Lands. The impetus for this issue paper is the need for a reasonable and legally defensible approach to this problem. This document presents information developed during a literature review and consultation with experts conducted by the Heritage Resources Group of Los Padres National Forest. This document was not prepared in support of any ongoing environmental analysis.

Background Events

In 1989 the Office of General Counsel addressed the question whether the National Environmental Policy Act applies to renewal of grazing permits. Their advice, authored by Michael J. Gippert (Office of General Counsel 1989 [Appendix A]), is that NEPA does indeed apply to renewal of special use authorizations and grazing permits because NEPA applies to discretionary federal actions. Subsequently the Washington Office directed (2230; 23 February, 17 April [Appendix B], 27 July 1990) Regional Foresters to bring grazing and livestock use permits into conformance with Forest Plan direction. On a more general level the Chief (2360/1950; 9 October 1991 [Appendix C]), in response to an increasing number of appeals citing noncompliance with Section 106 of the Historic Preservation Act, directed the Regional Foresters to give full consideration to all potentially affected resources, including cultural resources, prior to making decisions.

This flurry of direction papers raised a number of questions concerning compliance of the grazing program with Section 106. These questions inevitably found their way to the Washington Office and culminated in even further direction. On 13 January 1992, the Chief (2230/2360/1950 [Appendix D])attempted to clarify direction on bringing allotment management plans (AMPs) into conformance with Forest Plans insofar as Section 106 compliance is concerned. It is this referenced "clarification memo" that is at the heart of the confusion referred to above. The clarification memo in effect concedes that issuance or reissuance of grazing permits and development or revision of AMPs are "undertakings" in the sense of Section 106. The letter also documents the Chief's supposition that "grazing, where such use has continued for many years, constitutes a 'no effect' determination under the provisions of NHPA." The letter recommends that Forests seek concurrence with "no effect" determinations for grazing permit renewals where there are no proposed changes. While the empirical basis for the recommended "no effect" approach is unlocatable in the text, the need for concurrence by the Advisory Council on Historic Preservation (and, by extension, the SHPO) is clearly stated. To date the Advisory Council has not concurred.

The memorandum also directs that archeological surveys are to be concentrated in areas of proposed new disturbance. This direction establishes a standard survey area for grazing allotments and allotment management plans--this area includes neither allotments in their entirety nor usable acres within them save where new development is proposed.

This letter has been widely misinterpreted in the field as a blanket No Effect determination. Further, the letter has been taken as authorization to proceed to No Effect determinations without empirical field observations. The Forest Supervisor of a large southern California National Forest, for example,

recently determined that archeological surveys for grazing permits and allotment management plans are unnecessary unless new construction is proposed. Several environmental analyses are now underway on that Forest and no archeological survey is being done.

Archeological studies and soil studies do not support the ideas underlying the Chief's no effect supposition. On the contrary, such studies support what is obvious through simple inspection--cattle have effects on archeological sites. Further, studies suggest that such effects are in all likelihood cumulative.

Archeological and Soils Research

Impacts on archeological sites from cattle grazing can be divided into two categories: impacts to site matrices (e.g. soil) and impacts to artifacts and other cultural remains.

We have been unable to locate archeological studies that directly address grazing impacts to site matrices. However, impacts to archeological site matrices are essentially soil impacts and we have therefore turned to the soils literature. Soils are highly variable and their susceptibility to erosion and other effects of grazing are dependent on a wide variety of factors including vegetation, slope, rainfall, and soil particle size, porosity, aggregation, and moisture.

Although the grazing-soils relationship is complex, there are several consequences of grazing that have potentially adverse effects for archeological sites. First, the matrix of archeological sites is affected by a number of direct effects of livestock, including chiseling in damp soils and sloughing and collapse of streambanks (Marlow, C.B. et al. 1987). Such effects are highly likely in the arid west, where both archeological sites and areas of cattle congregation have a high association with sources of water. Second, the matrix of archeological sites is affected by a number of indirect effects of livestock, including removal or partial removal of vegetation (Evans, R. 1980), and trampling-induced compaction (McCarty, M. and Mazurak 1976; Weltz, M. et al. 1989). Such indirect effects reduce infiltration and increase runoff by a number of well-understood mechanisms.

The archeological literature on grazing effects is both scant and directed almost entirely to impacts upon artifacts and other cultural materials. The U.S. Army Corps of Engineers (1990:5) recently summarized several studies dealing indirectly with livestock impacts on archeological sites. Such indirect impacts include biomass reduction leading to erosion, streambank destabilization, and downhill transport of artifacts. Diachronic monitoring conducted by BLM archeologists has identified a close link between reduction of vegetation through grazing and the incidence of vandalism and artifact collection (Don Manuel, BLM, pers. comm. 1993). However, two studies encountered during the literature review deal directly with cattle grazing impacts--these two studies are summarized below. One (Roney 1977) assesses impacts from high density aggregations of cattle. The second (Osborn et al:1987) assesses the occurrence and variability of cattle-induced impacts to artifacts across a single season in a number of test plots. Comparison of the two studies has implications for understanding cumulative effects.

Roney placed 50 obsidian artifacts and ten unmodified obsidian nodules on the ground surface of a corral occupied by cattle. He later recovered most of these items and did quantified analysis of physical damage and displacement. Because of the high density of cattle in the corral, the impacts were estimated to be roughly equivalent of 12 years of grazing at a typical cow:acre density of 1:20. Roney observed significant effects on artifacts--all artifacts were damaged to some extent through flaking, edge damage, or breakage--moderate to severe damage occurred on 38% of the study collection. Both horizontal and vertical displacement of artifacts was observed. Horizontal movement occurred in 38% of the study collection with a typical displacement of approximately one meter. Vertical movement was not quantified by distance of movement but, of the original collection of 60 items, only three were left on the surface at the end of the test period.

Although Roney's study is small and needs to be interpreted in light of soil type and prevailing conditions, it clearly confirms that cattle damage artifacts and disturb artifact provenience.

A more extensive and carefully designed study was conducted (Osborn et al. 1987) in Capitol Reef National Monument. At the time of the study, grazing in the Monument was managed primarily as winter range for cattle. The study team examined qualitative conditions at eight rockshelter sites and assessed impacts at 13 experimental plots. The plots were distributed across a variety of conditions both near and away from water sources. The control plot was established within an exclosure. Each plot was salted on the surface with experimental artifacts of stone (obsidian, tabular chert, chalcedony, or fused shale) or unglazed ceramics placed singly in twenty randomly selected cells; a total of 980 experimental artifacts were stationed in such a way. At the end of the six month grazing season, provenience data were gathered for the 818 (83.5%) of the experimental artifacts which remained visible on the surface.

The visible artifacts were collected and studied under laboratory conditions. Damaged artifacts occurred in 83% of the sample plots with the most damage apparent in the ceramic fraction. Of the recovered experimental lithic assemblage, damage was observed in 11 instances. Horizontal displacement appeared in 23.5% of the placements which remained visible. No breakage and only minimal horizontal displacement took place in the control plot. Artifact damage and displacement occurred both near water sources and at plot locations away from water sources. The condition assessment at the eight rockshelter sites included observations of extensive drifts of cowdung, churning of site deposits, and destruction of an architectural feature.

The results of the two studies summarized above cannot be directly compared, primarily because Roney recovered buried artifacts and Osborne did not. However, the contrast in damage and displacement results suggests an interesting conclusion concerning cumulative effects. Roney observes far higher incidence of both damage and horizontal displacement than does Osborn. The simplest explanation, and one not missed by Osborn (1987:54), is that the substantially longer exposure of Roney's experimental assemblage compared to Osborn's assemblage (12 year equivalent vs. 6 months actual) is the driving factor.

Archeologists and others have long known that cattle grazing causes impacts to archeological sites and that those impacts are not limited to developments or

areas of cattle concentration. Archeological studies are only just beginning, but the existing information has been sufficient to guide the course of the Bureau of Land Management in coordinating range management and historic preservation.

What our Sister Agency is Doing

The Bureau of Land Management administers roughly 163 million acres of grazing land in the 11 western states, almost twice the area of grazing land administered by the Forest Service in the same region. The scope of the BLM grazing program is vast and their responsibilities for managing cultural resources on grazing land are extensive.

In recognition of the scope and importance of this responsibility (and encouraged by an NRDC lawsuit), the BLM, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers entered into a programmatic memorandum of agreement (PMOA) that governed BLM grazing program compliance with Section 106 in the 11 western states [Appendix E]. The PMOA as written guided Section 106 compliance for livestock grazing on a large number of planning units in the decade between 1979 and 1988.

This PMOA establishes several relevant principles and operational procedures. First, it establishes that livestock grazing and range improvement are potential effects that require compliance with Section 106. Second, it stipulates that both "existing data" inventories and sample-based field investigations will be done prior to completion of environmental documents for allotments or groups of allotments. Third, it stipulates that detailed and complete field investigations will be completed prior to decisions concerning range improvement activities. Fourth, it stipulates that grazing and range improvement activities will be designed to avoid adverse effects on National Register eligible or listed properties.

The EIS for the Cal-Neva Planning Unit (USDI BLM 1981) is an example of the influence of the PMOA. The Cal-Neva Unit is 643,000 acres of multiple use land straddling the California-Nevada border. There are nine allotments within the Unit. "Protection of cultural resource values from destruction by livestock" was one of six major issues addressed in the statement. In all, 6.1% of the Unit (approximately 40,000 acres) were surveyed for cultural resources specifically for the EIS. When combined with other surveys done for projects, a total of 13.8% of the Unit (92,000 acres) was surveyed prior to completion of the EIS. The affected environment chapter of the EIS indicates that 381 archeological sites were recorded and that many were considered eligible for the National Register of Historic Places. Impacts of the several alternatives designed to continue grazing at current or near current levels include "diffuse trampling, while those located near water, . . . would continue to receive intense trampling. Moreover, continued erosion due to devegetation would continue attrition of cultural deposits" (USDI BLM 1981:3-45). In addition, "trampling would continue to result in the breakage of surface materials,

further displacement of spatial patterning, and the vertical mixing of near-surface deposits" (USDI BLM 1981:3-16).

Mitigation of these impacts included a monitoring program and annual archeological survey equivalent to one percent of the Unit's area. The results of the monitoring program have confirmed the types of impacts that were expected and have even discovered such new classes of impacts as ingestion of artifacts with subsequent relocation elsewhere (Don Manuel, BLM, pers. comm. 1993).

Current Forest Service Approach to Grazing under Section 106

The Chief's "clarification" memorandum of 13 January 1992 [Appendix D] establishes an approach to satisfying Section 106 responsibilities which is 1) radically different from the accepted approach of the Bureau of Land Management, 2) at odds with empirically derived information on impacts and effects, and 3) inconsistent with regulations (36CFR800) implementing Section 106.

Regulations implementing Section 106 of the Historic Preservation Act and 1992 amendments to the Act contain key definitions that are relevant to determining the scope of field investigations necessary to satisfy legal requirements. The definitions of "undertaking", "area of potential effects", and "effect" are particularly important to revisit in relation to the Chief's clarification memorandum.

"Undertaking" is newly defined in the Historic Preservation Act amendments of 1992 (HR 429). An undertaking is any project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency. The Chief, in his clarification memo, has in effect determined that grazing permits and allotment management plans constitute undertakings. "Area of Potential Effects" (or APE) is the area within which an undertaking may cause changes in the character or use of historic properties. When the Chief suggests, as he does in the clarification memo, that archeological survey of allotments be limited to areas of new ground disturbance, he is effectively providing an operational definition of APE for grazing allotments at large.

But in order to delineate an APE for grazing allotments, or for any undertaking, it is necessary to understand what constitutes an "effect" under Section 106 and to understand the potential impacts of the undertaking. An undertaking has an effect when it <u>may</u> alter characteristics that <u>may</u> confer significance. The threshold for effect is quite low--requiring only the possibility of altering characteristics lending significance. Among other traits, the distribution of artifacts within an archeological matrix and across a site surface and, indeed, the artifacts themselves contribute to a site's potential significance. Archeological and soil studies both indicate that the cows cause impacts to archeological sites and that those impacts have effects on archeological sites. Reason dictates, then, that APEs of grazing-related undertakings extend beyond the bounds of new construction into areas used by

cows in their normal activities, whether those be resting, drinking, milling, walking or almost any other thing cows do. Reason also dictates that it is perilous to proceed with No Effect determinations without sound information on historic properties within APEs of grazing undertakings.

Conclusion

Archeological studies, soil studies, and monitoring information confirm what has been obvious to field archeologists for many years: livestock grazing has an effect on archeological sites. These same sources suggest that such impacts are cumulative. These effects occur in areas of cattle concentration and in dispersed grazing areas.

There is little basis for the belief that effects of grazing are limited to new developments. By extension there is little basis for the Chief's recommendation to limit areas of potential effects to new, ground disturbing projects. On the other hand, there is all the reason in the world to pursue the concurrence of the Advisory Council and the SHPO with determinations of effect for livestock grazing if empirical observations warrant.

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APPENDICES

United States Department of Agriculture | Office of General Counsel | Washington, D.C. 20250 | DG Address OGC:W01E

A

MEMORANDUM

August 25, 1989

TO: James C. Overbay
Deputy Chief
National Forest Service

Jeff M. Sirmon
Deputy Chief
Programs and Legislation

FROM: Michael J. Gippert /s/
Deputy Assistant General Counsel
Natural Resources Division

SUBJECT: Whether the National Environmental Policy Act (NEPA) applies to renewal of Forest Service special-use authorizations and grazing permits.

This is to document our recent advice regarding the applicability of NEPA to the renewal of ski area and other permits which allow for the occupancy or use of National Forest System lands. The issue arose in Region 5 when the Heavenly Valley, California ski area's special use permit came up for renewal. The San Francisco OGC Regional Office advised the Regional Forest Service office that NEPA applied to the permit renewal decision, that no current Forest Service categorical exclusion covered such renewals, and thus that an EA/FONSI and Decision Notice would be required at a minimum. We concur with the San Francisco office's advice, and prepared this memorandum to clarify the reasons for our position. We understand that an EA is being prepared for the Heavenly Valley renewal, but think that the question of permit renewals and NEPA will undoubtedly become an increasingly prominent issue that the Forest Service needs to confront early.

NEPA applies to renewals of special use authorizations or grazing permits (hereinafter collectively referred to as "permits"), because NEPA applies to discretionary federal actions.[1] The Forest Service has broad discretion whether or not to renew a permit. Moreover, the Forest Service has similarly broad discretion to modify the terms and conditions of such permits.[2]

With the question of NEPA's general applicability to permit renewals settled, the Forest Service's attention must turn to determining what it must do to comply with NEPA when renewing permits. The NEPA regulations require each federal agency to develop its own set of NEPA procedures [40 CFR 1507.3], and the Forest Service is currently engaged in updating its NEPA procedures. These agency procedures identify:

a.) which types of actions normally meet the criteria for preparation of an EIS (i.e. - if the action is a "major federal action significantly affecting the quality of the human environment");
b.) which actions normally require EAs; and
c.) which actions normally do not have a significant effect on the quality of the human environment and therefore can be categorically excluded (CE)[3] from further NEPA review procedures.

Thus, the NEPA regulations provide the Forest Service with a golden opportunity to seize the initiative and determine for itself how to satisfy NEPA when renewing permits, rather than having a federal judge dictate an unwelcome order.

No formula exists to determine which permit renewals require EISs, EAs, or CEs. These are fact-specific determinations. While the duration of a permit is obviously an important consideration, it is only one factor to consider under NEPA. For example, it is not difficult to envision an annual permit whose renewal nonetheless requires an EIS (e.g. reauthorization of an annual event that significantly affects sensitive lands in a National Forest). Conversely, longer-term permit renewals can have little if any environmental impacts (e.g. renewal of an authorization to operate a transmitting tower on National Forest land).

Caselaw[4] and a recent recommendation from CEQ[5] help clarify the current trend of NEPA law for permit renewals. The recommendation by CEQ resulted from a disagreement between the Bureau of Reclamation and EPA over whether the Bureau's renewal of the long-term (40-year) water contracts for the Friant Unit of the Central Valley Project (CVP) in California required an EIS. [54 Fed. Reg. 28477, July 6, 1989]. The Friant Unit consists of 1.) the Friant Dam on the San Joaquin River, creating Millerton Lake, and 2.) two canals which carry water from Millerton Lake to 28 irrigation districts. Each of these 28 irrigation districts have 40-year water supply contracts with the Bureau - the renewal of which prompted the referral to CEQ. The Department of the Interior (DOI) argued that the Bureau was not required to prepare an EIS or EA for mere renewal of the water supply contracts where there was no substantial change in the terms of the contracts, such renewals doing nothing more than retaining the status quo. EPA took a contrary position.

In its recommendation, CEQ first found that although the Bureau had limited discretion concerning whether to renew the contracts, it did have sufficient discretion over the terms of the contracts to make the renewals subject to NEPA. Then, after careful review of the Bureau's NEPA procedures, CEQ found that those procedures normally require preparation of an EIS for "proposed water service contracts or amendments thereof" where NEPA compliance had not already been accomplished.[6] Even though the Bureau had a categorical exclusion (CE) for renewal of water supply contracts, CEQ found that CE inapplicable to the water contracts in question because they were initially executed without NEPA compliance. CEQ's final recommendations were:

1. That the Bureau prepare EISs for each water service unit of the CVP prior to renewal of that unit's individual long-term water contracts. CEQ strongly recommended against the preparation of a separate EIS for each water contract.
2. That the "No Action" alternative in the EISs should be renewal of the long-term water contracts with no significant changes, rather than a "No Action" alternative which presents a return to the Central Valley environment in existence before the CVP.

The above recommendations by CEQ give the Forest Service a good idea of how its own permit renewals can be handled to avoid a legal and administrative quagmire. First, an attempt to contest the applicability of NEPA to permit renewals will be in vain. However, NEPA applicability does not necessarily mean an EIS. Some, but certainly not all, Forest Service permit renewals present an opportunity for the use of a CE, especially if the permitted activity has

already been through an initial NEPA analysis. For example, renewal of a non-ground-disturbing, short-term permit with no significant change in the terms or conditions could likely be categorically excluded provided the activity had already received a NEPA analysis.

In the case of renewal of permits authorizing more substantial development or use of the National Forests, e.g. - ski facilities, resorts, etc., an EIS may be necessary, and certainly an EA will be required at a minimum. Permit renewals present a situation where programmatic EISs with subsequent tiering may be an efficient means of satisfying NEPA. Again, no steadfast rules exist, and each situation must be examined independently. As CEQ noted, ultimately each federal agency must determine for itself the scope of its environmental documentation by considering which geographical, environmental, and legal parameters best support its decisionmaking process.

In deciding on the proper way to satisfy NEPA when renewing a permit, the Forest Service should also take into account the appealability of renewal decisions. The question of appealability appears to differ between 36 CFR 217 (appeals by members of the public) and 36 CFR 251 (appeals by permitees). Under 217 all renewal decisions subject to NEPA (i.e. requiring an EIS, EA, or CE) and documented in a ROD, DN, or DM are appealable by any person. However, under 251 there is currently some question as to the appealability of permit renewals, as renewals are not explicitly addressed in that regulation. It is our advice that permit renewal decisions can only be appealed under 36 CFR 251 if the decision to deny renewal is made before the original permit expires; if made after expiration, any resulting appeal right would be inconsistent with 251's limitation to permit holders. This interpretation may need to be further considered.

In conclusion, we urge the Forest Service to include direction for permit renewals in its forthcoming NEPA implementing procedures. For those renewals which do not have a significant effect on the quality of the human environment, a CE should be promulgated. With a written list of CEs, as well as direction to the field and notice to the public as to when an EIS or EA is required, the Forest Service should be able to avoid untoward results in its permit renewals. We will be glad to work with you to prepare a workable procedure to comply with NEPA in the area of permit renewals.

Enclosure

cc: (without enclosure)
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NOTES

[1] see, Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Cir. 1981)(NEPA requirements inconsistent with the mandatory, nondiscretionary duty f the agency to list endangered species upon a specific factual finding); tate of South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980)(ministerial acts are outside the ambit of NEPA's EIS requirement and thus exempt from the requirement).

[2] NEPA analsis for permit renewals provides an opportunity for the Forest Service to also check for compliance with other applicable federal laws (Clean Water Act, Endangered Species Act, wetlands Executive Order, etc.)

[3] Categorical exclusions are a written list of categories of actions which do not individually or cumulatively have a significant effect on the human environment and for which therefore, neither an EA nor an EIS is required [40 CFR 1508.4]. The list of CEs itself must be circulated for public comment as well as reviewed by CEQ. This provides public "testing" of the category.

[4] Confederated Tribes v. F.E.R.C., 746 F.2d 466 (9th Cir. 1984)(F.E.R.C. required to prepare an EIS prior to the relicensing of a power plant).

[5] Section 309 of the Clean Air Act established a referral process by which CEQ has authority to resolve interagency disagrements concerning the environmental effects of proposed federal actions.

[6] Although the water supply contracts for the CVP had been entered into before NEPA enactment on January 1, 1970, CEQ's regulation provides that "NEPA shall continue to be applicable to actions begun before January 1, 1970 to the fullest extent possible." [40 CFR 1506.12(b)]

[7] A comprehensive list of Forest Service actions categorically excluded from the requirement of an EA or EIS would also ease the agency's NEPA burden outside the realm of permit renewals. For example, most Forest Service rulemaking and policymaking could be categorically excluded under NEPA.

[8] CEQ recommended to the Bureau that it "consider" whether a programmatic EIS on all CVP long-term contracts would be a "useful, efficient" approach to NEPA compliance.

United States Department of Agriculture | Forest Service | WO

B

Reply to: 2230 Date: April 17, 1990

Subject: Conformance of Grazing and Livestock Use Permits with Forest Plan Direction

To: Regional Foresters, except R-10

The National Forest Management Act (NFMA) requires resource permits, contracts and other instruments be consistent with land management plans (16 U.S.C. 1604(i)). It states: "Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. Those resource plans and permits, contracts, and other such instruments currently in existence shall be revised as soon as practicable to be made consistent with such plans."

It is the intent of NFMA and the implementing regulations that as existing term grazing permits are reissued, or new term grazing permits issued, they will be consistent with Forest Plan direction. Temporary grazing permits and livestock use permits, which are issued for 1 year or less, will comply with Forest Plan direction when issued. The Chief emphasized this requirement in his February 23 letter concerning Forest Plan implementation. The objective of this letter is to identify the approach to be used to implement this direction.

Consistency is determined by comparing the grazing permit, including the allotment management plan (AMP), with the Forest Plan direction stated in terms of Forest-wide and management area standards and guidelines. The AMP and grazing permit(s) must be made consistent with the Forest Plan, or the Forest Plan must be amended (FSH 1909.12 Chapter 5.31a 1.). Any Forest Plan amendment must include appropriate public involvement as well as appropriate NEPA analysis and documentation.

All permittees must be informed of the standards, guidelines, and management requirements of the Forest Plan once the Plan is approved. The implementation of Forest Plan direction pertaining to each allotment should be personally discussed with the permittees on that allotment and this discussion documented.

Forest Supervisors and authorized District Rangers shall bring grazing permits into compliance as soon as practical. In any case, when they reissue permits, because of expiration or waiver, or issue new permits, the permits will comply with the Forest Plan. Authorized officers will accomplish this by; (1) modifying the AMP, which is part of the permit, to include the standards and guidelines, or (2) modifying part 3 of the grazing permit to include the standards and guidelines if no AMP exists.

The AMP is the most appropriate vehicle for implementing the standards and guidelines of the Forest Plan. Priority is to be placed on developing AMPs for all allotments which incorporate Forest Plan standards and guidelines. Each Forest Supervisor shall establish a priority schedule for developing AMPs consistent with Forest Plan direction. Among the factors used in developing the schedule should be the expiration date of existing term grazing permits and budget availability.

The following is a list of various situations and the action necessary to make the permitted grazing use consistent with the Forest Plan.

Existing Stocked Allotment.

- No change needed in the AMP to be consistent and NEPA documentation related to the AMP adequately considers current conditions, regulations, and policy. Any permit reissued under the above conditions may rely on the existing NEPA documentation and the permit record shall contain a statement by the issuing officer that the above conditions have been met.

- No change needed in the AMP to be consistent, but no current NEPA documentation exists for the AMP - Conduct the necessary environmental analysis and document the results as appropriate. In those AMP modifications that have little potential for increasing soil movement, degrading water quality, or impacting sensitive resource values and where no extraordinary circumstances exist, the modification may normally be categorically excluded from documentation in an EIS or EA. However, the decision to proceed must be documented in a decision memo. Reissue the permit, if appropriate.

- Minor change needed in AMP to be consistent - Conduct the appropriate NEPA analysis and modify the AMP. Where this modification meets the criteria discussed above, the modification may normally be categorically excluded from documentation in an EIS or EA. However, the decision must be documented in a decision memo. Reissue the permit with the modified AMP as a part, if appropriate.

- Substantial change needed in AMP to be consistent or no AMP exists -

(1) AMP exists - Conduct an environmental analysis and modify the AMP to be consistent with the Forest Plan. Prepare appropriate NEPA documentation and decision document. Reissue the permit with the AMP as a part, if appropriate.

(2) No AMP exists - Conduct an environmental analysis of the allotment involved and include the Forest Plan direction in part 3 of permit(s) to be issued to replace expired or waived permit(s). Prepare appropriate NEPA documentation and decision document. Reissue permit(s), if appropriate.

New or Vacant (Nonstocked) Allotment.

- Conduct an environmental analysis and develop an AMP which is consistent with the Forest Plan. Prepare appropriate NEPA documentation and decision document. Issue the new permit, if appropriate.

The administrative appeal regulations, 36 CFR 217 or 36 CFR 251, apply to decisions concerning modification of permits or AMPs and issuance or reissuance of permits, as appropriate.

/s/ James C. Overbay for

F. DALE ROBERTSON
Chief

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Reply to: 2360/1950 Date: OCtober 9, 1991

Subject: Scheduling the Evaluation of Effects on Cultural Resources in the NEPA process

To: Regional Foresters

Recent administrative appeals and program reviews have identified an issue that appears to be nationwide--the proper timing of consideration of cultural resource evaluations in project planning. The issue relates to compliance with the National Environmental Policy Act (NEPA). Environmental Assessments for timber sales have been prepared and Decision Notices (DN) signed without cultural resource surveys and evaluations having been completed but with the provision that this work would be completed before the timber sale was sold. The assertion is made through appeal that the gathering of this information after a decision has been made is a violation of NEPA.

We are receiving increasing numbers of appeals citing the above NEPA issue. The issues may be both real or surrogate; however, it is clear that from a planning and resource management standpoint, we need to do a more complete job of evaluating and disclosing the effects of proposed projects on cultural resources in the NEPA process. The solution to this problem is to give full consideration to all resources, including cultural resources, that could be affected by our proposed actions before a decision is made.

To meet this direction and fulfill our NEPA responsibilities, all Forest Service projects must be designed and reviewed with cultural resources in mind. We have examples of projects that, because of inadequate design and review in the NEPA process, could have adversely affected cultural resources had they not been modified or halted before being fully implemented. The time and resources needed to correct project deficiencies and reevaluate and modify projects and Decision Notices prevents the accomplishment of other projects, uses resources that are needed elsewhere, and threatens other resource management programs.

Fully-informed land management decisions cannot be made before the decisionmaker knows if or how proposed actions will affect cultural resources. You are to ensure that cultural resource inventories and evaluations are done, and then documented, for all Forest Service actions in the NEPA process. They should be started early in the environmental analysis process in order to formulate viable alternatives, and then documented by the cultural resource specialist as part of compliance with Section 106 of the National Historic Preservation Act. This compliance process (36 CFR 800), including documenting appropriate consultation with the State Historic Preservation Officer and the Advisory Council on Historic Preservation, must be completed before the Decision Notice or Record of Decision is signed.

We understand that in some instances this will require a change in current operational procedures. We expect that you will proceed in a deliberate manner to change procedures and comply with this direction as rapidly as possible.

If you have any questions concerning these issues, please contact the Federal Historic Preservation Officer (Evan DeBloois) on the Recreation, Cultural Resources, and Wilderness Management Staff at (202) 205-1427, or FTS 445-1427.

/s/ James C. Overbay (for)

F. DALE ROBERTSON
Chief

FS:RN:EDeBloois:pp:1/23/91
Retype:pp:1/28/91
Retype:sbs:01/30/91
Rewrite per LHenson:EDeBloois:sbs:05/14/91
Rewriter per EIDeBloois:sbs:08/06/91

D

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

Reply to: 2230/2360/1950 Date: January 13, 1992

Subject: Clarification - Evaluation of Effects on Cultural Resources in the NEPA Process and Issuance of Grazing Permits

To: Regional Foresters, except R-10

Conformance of grazing and livestock use permits with forest plan direction was discussed in two 2230 letters dated April 17 and July 27, 1990. Those documents gave direction on permit issuance with regard to the status of allotment management plans (AMPs). In summary, when associated AMP's are inadequate or nonexistent, permits are issued with forest plan standards and guidelines included as special terms and conditions, together with a clause stating when a new AMP is expected to be completed. Refer to those documents for further clarification regarding NEPA and the issuance of permits.

Questions have arisen regarding the 2360/1950 letter of October 9, 1991, and its effect, if any, on the issuance of grazing permits. Section 106 of the National Historic Preservation Act (NHPA) requires that the head of any Federal agency may not license any "undertaking" without first taking into account the possible effects on any historic district, site, etc., that is included in or eligible for inclusion in the National Register of Historic Places. We believe that grazing (including permitted livestock and recreational stock), where such use has continued for many years, constitutes a "no effect" determination under the provisions of the NHPA. However, this determination has not yet been ratified by the President's Advisory Council on Historic Preservation in accordance with the provisions of 36 CFR 800. We are proceeding as rapidly as possible to obtain such a determination.

In the absence of such an agreement, the renewal of "no effect" would be based on continued land use where impacts on cultural resources are likely to be minimal, if any. General cultural resource surveys of such permitted uses are not necessary unless they authorize new ground-disturbing activities, such as spring development, stock pond construction, and/or fencing. In range management, "project level" is considered to be the AMP. When developing AMP's, cultural resource evaluations would be appropriate as part of the NEPA process. When conducting these evaluations, it is Forest Service policy to concentrate the effort on sites of proposed ground-disturbing activities, i.e., areas scheduled for development of structural or nonstructural range improvements.

If grazing by domestic livestock is proposed in a new allotment, conduct an environmental analysis, including an appropriate cultural resource assessment, and develop an AMP which is consistent with the forest plan. Prepare the appropriate NEPA documentation and decision document. Issue the new permit, if appropriate. In previously ungrazed areas with high potential for animal contact with cultural resources, a cultural resource survey would be part of the NEPA process. Concentrate on known areas of concern within the proposed allotment.

If you have any questions regarding these issues, please contact Evan DeBloois, the Federal Historic Preservation Office, WO Recreation, Cultural Resources, and Wilderness Management Staff, at (202) 205-1427 or FTS 445-1427.

/s/ George M. Leonard
for
F. DALE ROBERTSON
Chief

cc:
RCR&WM
LMP

RGE:PClark:gdf:11/7/91
Retyped:gdf:1/3/92
P.Clark:Arch/Graz:2nd version

Advisory
Council On
Historic
Preservation

1522 K Street NW.
Washington D.C.
20005

PROGRAMMATIC MEMORANDUM OF AGREEMENT
BETWEEN THE
DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
AND THE
NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS
REGARDING THE
LIVESTOCK GRAZING AND RANGE IMPROVEMENT PROGRAM

WHEREAS, the Department of the Interior, Bureau of Land Management, administers public lands, principally in the 11 Western States and Alaska, under concepts of multiple-use and sustained yield, and, among other responsibilities, the Bureau of Land Management is charged with management of rangeland and forage products under the Taylor Grazing Act of 1934 (43 U.S.C. 315) and the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701), which also charges the Bureau of Land Management with the management and protection of cultural resources; and

WHEREAS, Section 106 of the National Historic Preservation Act (16 U.S.C. 470f, as amended, 90 Stat. 1320) requires that the head of any Federal agency having direct or indirect jurisdiction over a proposed Federal, federally assisted, or federally licensed undertaking affecting properties in or eligible for the National Register of Historic Places shall afford the Advisory Council on Historic Preservation (hereafter Council) a reasonable opportunity for comment; and

WHEREAS, livestock grazing and range improvement activities undertaken by the Bureau of Land Management may have an effect upon properties in or eligible for the National Register of Historic Places and will require compliance with Section 106 of the National Historic Preservation Act, Section 2 of Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment," and the Council's regulations, "Protection of Historic and Cultural Properties" (36 CFR Part 800); and

WHEREAS, the Bureau of Land Management is currently engaged in an ongoing program of rangeland management which involves the preparation, by 1988, of approximately 145 environmental statements on specific areas where grazing is permitted on approximately

174 million acres of public lands in the Western States and has requested Council review of the rangeland management program; and

WHEREAS, the Council and the Bureau of Land Management have met and reviewed the livestock grazing and range improvement program of the Bureau of Land Management and its relation to compliance with Section 106 of the National Historic Preservation Act of 1966 and Executive Order 11593, as implemented by the Council's regulations (36 CFR Part 800) and the responsibilities for historic and cultural resources under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) as implemented by the Council on Environmental Quality in the "National Environmental Policy Act Regulations" (40 CFR Parts 1500-1508).

NOW, THEREFORE, it is mutually agreed that the Bureau of Land Management will ensure, through the stipulations outlined in this Programmatic Memorandum of Agreement, that historic and cultural properties will be given adequate consideration in grazing management program decisions and implementation which includes, but is not limited to, the preparation of grazing environmental statements, thereby meeting its responsibilities under Section 106 of the National Historic Preservation Act.

STIPULATIONS

1. The Bureau of Land Management will conduct Class I (existing data inventory) and Class II (sampling field inventory) inventories of historic and cultural properties, as specified in BLM Manual Section 8111, to be completed at the appropriate planning stage and prior to the preparation of the draft environmental statement. Inventory results will be evaluated, in consultation with the appropriate State Historic Preservation Officer, to identify properties included in or eligible for inclusion in the National Register of Historic Places.

   a. The inventory requirement may be modified on a case by case basis for interim grazing environmental statements (i.e., those prepared during fiscal years 1979 through 1981) if an alternative is acceptable to the appropriate State Historic Preservation Officer.

b. If an acceptable alternative cannot be negotiated with the appropriate State Historic Preservation Officer, then the Bureau of Land Management will proceed with the preparation of the environmental statement and request the comments of the Council in accordance with 36 CFR 800. The Council's comments will be included in the final environmental statement.

2. This Programmatic Memorandum of Agreement and the inventory reports identifying historic and cultural properties will be referenced in each environmental statement.

3. Prior to commencement of any range improvement activities which involve land disturbance, the Bureau of Land Management will conduct a Class III inventory, as specified in the BLM Manual Section 8111.4, supplementing previous surveys to locate, identify, and evaluate properties in the impact area that may be eligible for inclusion in the National Register of Historic Places. Range improvement activities which involve land disturbance include, but are not limited to, such activities as construction of fencing and corrals, water development, chaining, and controlled burning. If properties that may be eligible for the National Register are found, the Bureau of Land Management will consult with the appropriate State Historic Preservation Officer and forward the documentation to the Keeper of the National Register to obtain a determination of eligibility in accordance with 36 CFR Part 63.

4. The Bureau of Land Management will provide the appropriate State Historic Preservation Officer with copies of the reports of the Class I, II, and III inventories in accordance with Sections 102(a)(2) and 202(c)(9) of the Federal Land Policy and Management Act of 1976 for inclusion as part of the State inventory conducted pursuant to 36 CFR Part 61.

5. The Bureau of Land Management will design the livestock grazing and range improvement program to avoid adverse effects on properties included in or eligible for inclusion in the National Register of Historic Places, unless this is not prudent or feasible.

6. Where it is not prudent or feasible to avoid adverse effects on properties included in or eligible for inclusion in the National Register of Historic Places as part of a livestock grazing and range improvement program authorization and the property is not a National Historic Landmark or National Historic Site, the Bureau of Land Management will consult with the appropriate State Historic Preservation Officer and will:

   a. Develop mutually acceptable measures to mitigate the impact of the proposed action; and

   b. Notify the Council in writing of agreements reached with the State Historic Preservation Officer under the provisions of 6(a) above. The Council need not be afforded further opportunity for review and comment.

7. The provisions of this Programmatic Memorandum of Agreement shall apply to the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

8. If it is determined that the affected property is a National Historic Landmark or National Historic Site, or agreement cannot be reached between the Bureau of Land Management and the appropriate State Historic Preservation Officer on satisfactory mitigation measures, the Bureau of Land Management will request the comments of the Council in accordance with 36 CFR Part 800.

9. At the request of the President or a Member of Congress, the Council may advise the Bureau of Land Management, that a particular action, authorized by a grazing permit or lease, will require individual review and comment pursuant to 36 CFR Part 800. In that event, the Bureau of Land Management will comply with the provisions of the Council's regulations.

10. The Council and the Bureau of Land Management will review the provisions of this Agreement on an annual basis to determine whether modification or termination is appropriate. Should the current livestock grazing program of the Bureau of Land Management be revised, the ratifying parties will mutually determine whether the provisions of the Agreement will continue to apply.

Robert Utley 8/20/79
Deputy Executive Director (date)
Advisory Council on Historic
Preservation

Associate Ed Hastey 12/21/77
Director, Bureau of Land Management (date)

Larry E Jinn 8/26/79
President, National Conference of (date)
State Historic Preservation Officers

Robert T. Smith 1/11/79
Chairman (date)
Advisory Council on Historic
Preservation